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Appellee's Brief 1976-SC-0356

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-356

SARAH ANN ADKINS - - - Appellant

VS:

U. S. SHOE COMPANY, JAMES R. YOCOM,
CUSTODIAN OF THE SPECIAL FUND:
LIBERTY MUTUAL INSURANCE
COMPANY; and WORKMEN'S
COMPENSATION BOARD - - Appellees

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE HOLLIE CONLEY, JUDGE

BRIEF FOR APPELLEE

FILED

MAY 3 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

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This is to certify that true copies of the within
Brief have been mailed to Hon. Hollie Conley,
Judge, Floyd Circuit Court, Prestonsburg, Ken-
tucky, and to Hon. G. C. Perry, III, Attorney for
Plaintiff, Paintsville, Kentucky, this the 3 day
of May, 1976.

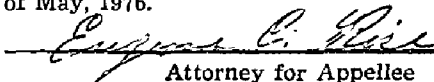

Attorney for Appellee

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STATEMENT OF QUESTION PRESENTED

WHETHER THE FLOYD CIRCUIT COURT
ERRED IN DISMISSING APPELLANT'S AP-
PEAL AND THEREBY BY SUSTAINING THE
ORDER AND JUDGMENT OF THE KEN-
TUCKY WORKMEN'S COMPENSATION
BOARD.

SUPREME COURT OF KENTUCKY

FILE NO. 76-356

SARAH ANN ADKINS - - - Appellant

vs: BRIEF FOR APPELLEE

**U. S. SHOE COMPANY, JAMES R. YOCOM,
CUSTODIAN OF THE SPECIAL FUND:
LIBERTY MUTUAL INSURANCE
COMPANY; and WORKMEN'S
COMPENSATION BOARD - - Appellees**

MAY IT PLEASE THE COURT:

NATURE OF THE CASE

This brief is prepared and filed pursuant to an appeal by appellant, Sarah Ann Adkins, after an Order and Judgment was entered by Floyd Circuit Court dismissing the appeal of appellee from the order of the Workmen's Compensation Board dismissing her claim.

COUNTER-STATEMENT OF FACTS

The plaintiff, Sarah Ann Adkins, is a 30 year old housewife who filed a claim with the Kentucky Workmen's Compensation Board asserting that she is totally and permanently disabled as a result of an alleged injury sustained on January 30, 1973, while working for defendant, U. S. Shoe Company (Tr. of Evid., p. 3). In her testimony appellant stated that she hurt her back while lifting boxes and that

the pain was immediate and occurred in the lower part of her back and ran down into her legs and up the back of her head (Tr. of Evid., p. 3). In her testimony she has stated that she saw Dr. Lowell Martin of Martin, Kentucky, for her alleged injury and that he transferred her to Dr. Peter Jones in Lexington, Kentucky, (Tr. of Evid., q. 27, p. 4). According to appellant she was injured in the similar manner on May 18, 1971 while working for U. S. Shoe Company, (Tr. of Evid., q. 33, p. 5) and as a result of that injury that she was off work for four or five months, (Tr. of Evid., q. 43, p. 6). She alleges that her second accident on January 30, 1973 resulted in a complete and total disability from working under any circumstances, (Tr. of Evid., q. 70, p. 8).

Appellant denied on cross-examination statements alleged to have been made by her to a representative of Liberty Mutual Insurance Company on June 16, 1971, that she had a prior back problem which occurred as a result of an injury at her home, and also denied that she had consulted Dr. Peter Jones for the problem (Tr. of Evid., Cross-Examination, q. 37-38, p. 6), and (Tr. of Evid., Cross-Examination, q. 47, p. 8).

Appellant testified that she had never been hurt other than two accidents heretofore mentioned and that she had never made any complaint about a back problem prior to May 18, 1971 (Tr. of Evid., q. 71, p. 6), and (Tr. of Evid., q. 72, p. 6-7).

The defendant, U. S. Shoe Company, did not have appellant examined but did take the depositions of three doctors that examined and treated appellant

for back problems prior to her alleged injury of January 30, 1973.

Dr. Lowell Martin of Martin, Kentucky, testified that he saw appellant, Sarah Ann Adkins, for the first time on December 9, 1969, and that her chief complaint was low back pain. At the time of his examination in 1969 appellant informed Dr. Martin that three years prior to her examination, some time in 1966, while carrying a ladder she injured her back and since that time, she experienced pain off and on, with said pain radiating into her right leg. On examination, Dr. Martin found that she had a ruptured disc at L-5 area (Tr. of Evid., q. 7, p. 3, Dr. Martin's deposition). The follow-up examination by Dr. Martin on February 30, 1970 indicated that appellant still had symptoms referable to a ruptured disc and that because of same he sent her to Dr. Peter Jones in Lexington, Kentucky, (Tr. of Evid., q. 8, p. 3-4, Dr. Martin's deposition). Dr. Martin also saw appellant on February 7, 1970, February 9, 1970 and in May, 1970. In his testimony Dr. Martin stated that at each time during 1969, 1970, 1971, 1972 and 1973, she complained of pain in the same L-5 area of the lumbar spine (Tr. of Evid., q. 16-17, p. 5, Dr. Martin's deposition).

Dr. William C. Roland, orthopedic surgeon, of Ashland, Kentucky, examined plaintiff on June 1, 1971 and again in August of 1972 on referral by Dr. George Auxier of Prestonsburg, Kentucky. During his taking of her medical history she stated to him, "that her onset of low back and right leg pain occurred in 1970, leading to hospitalization in March,

1970 in Lexington," (Tr. of Evid., q. 11, 12, 13, p. 3, Dr. Roland's Deposition). Dr. Roland again saw her in August of 1972 on referral by Dr. Lowell Martin and at that time she still complained of pain in the same area of her low back as in 1971, but complained of pain in her left leg rather than her right leg as she had done in 1971, (Tr. of Evid., q. 20, 21, 22, p. 5-6, Dr. Roland's deposition).

Dr. Peter H. Jones, neurosurgeon, of the Lexington Clinic, Lexington, Kentucky, testified that he first saw appellant on January 15, 1970. In his testimony he stated

"That she had a complaint of trouble with her back for three and one-half years, which had commenced when she bent over." (Tr. of Evid., q. 12, p. 4, Dr. Jones' Deposition)

Dr. Jones stated that appellant did not give him a history of any particular traumatic accident or incident, but that

"she said it started when she bent over to tie her shoelace; and that it reoccurred a year later, for which she had conservative treatment, which got rid of the pain and a month before I saw her, she had again reoccurrence of pain in the back, gradually came on," (Tr. of Evid., q. 13, p. 4-5, Dr. Jones' Deposition).

After her initial visit Dr. Jones hospitalized her in the St. Joseph Hospital on February 17, 1970, at which time a myelogram was performed. His diagnosis in 1970 was a lumbar disc problem at the fifth lumbar disc, (Tr. of Evid., q. 17-18, p. 5-6, Dr. Jones'

Deposition).

Dr. Jones again saw her in 1971, following the incident while she was working for defendant, U. S. Shoe Company. In his testimony he stated that appellant:

“was experiencing pain in her back in the same area as she did in 1970 when she first saw him.”
(Tr. of Evid., q. 23, p. 7, Dr. Jones’ Deposition).

Dr. Roland stated that when he saw appellant in March, 1973, following the incident about which she has filed this claim that she was experiencing difficulty in the same area of her body complained of during his previous examination. According to Dr. Jones appellant did not relate to him any particular traumatic incident on the job in 1973 that brought about her pain but that the pain was just a recurrence of what she had been experiencing and seeing him about on previous occasions, (Tr. of Evid., q. 27, 28, 29, p. 7-8, Dr. Jones’ Deposition).

Dr. Jones gave appellant 20% disability to the body as a whole (Tr. of Evid., q. 36, p. 9, Dr. Jones’ Deposition), not as a result of any incident occurring at her place of employment in 1973 but for the disability he discovered following his examination in 1970. Dr. Jones’ disability rating would have been consistent throughout the entire period of treatment and examination by him up to and including examinations after the incident of 1973.

Appellant’s medical evidence consisted of testimony of Dr. E. E. Musgrave, and Dr. Curwood Hunter, both of whom have testified for plaintiffs in

numerous Workmen's Compensation cases. The Board had appellant examined by Dr. K. Harmon Fisher of Louisville, Kentucky, who found that appellant had a disability of 30% partial permanent which he attributed to the last alleged injury. In appellees' brief to the Board, appellee pointed out that a reading of Dr. Fisher's report clearly indicates that without question appellant failed to give Dr. Fisher an accurate history as to her back trouble.

The testimony of all physicians were by deposition before the Board at the time the Board by Order of the full Board dismissed appellant's claim and found:

"It appears that the alleged injury of January 30, 1973 was not a new injury. Whatever disability the plaintiff had before January 30, 1973, was the same disability she had after January 30, 1973. The plaintiff did suffer an injury in 1966 aggravation in 1970, and in 1971; but she worked from 1971 to January 30, 1973 without incident. The plaintiff is apparently 30% occupationally disabled, but this disability existed prior to January 30, 1973. Thus, the plaintiff has no claim relative to the incident of January 30, 1973."

Appellant's petition for review on appeal before a Floyd Circuit Court was dismissed by the Floyd Circuit Court who would not substitute additional findings for finding of fact made by the Kentucky Workmen's Compensation Board.

ARGUMENT

I

WHETHER THE FLODY CIRCUIT COURT ERRED IN DISMISSING APPELLANT'S APPEAL AND THEREBY BY SUSTAINING THE ORDER AND JUDGMENT OF THE KENTUCKY WORKMEN'S COMPENSATION BOARD.

It is the position of the appellee, U. S. Shoe Company, that the Workmen's Compensation Board was acting properly within its discretionary power and authority, after having been presented conflicting evidence as to plaintiff's disability, and the cause of same, by finding for appellee. In appellee's counter-statement of facts appellee draws to the Court's attention numerous facts presented into evidence before the Kentucky Workmen's Compensation Board that shows that appellant experienced substantial low back pain and injury years prior to the incident upon which her claim against appellee was initiated. Medical testimony was introduced by appellee which proved that appellant underwent treatment and examination for low back pain as early as 1966 and continued to receive treatment from various physicians for that complaint for several years. Appellant's testimony at best must be considered inconsistent as to her medical history but the testimony of treating physicians, Drs. Martin, Roland, and Jones unequivocally show that appellant's back problems and disability, if any, resulted from an old injury occurring sometime in 1966 and probably received at home (Tr. of Evid., q. 13, p. 4-5, Deposition of Dr. Jones). KRS 842.120 states in part:

“The employer shall be liable only for the degree of disability which would have resulted from the latter injury or occupational disease had there been no pre-existing disability or dormant, but aroused disease or condition.”

Appellant's position of a dormant condition brought into medical reality by an accident occurring in 1973 while working for appellee and same resulting in 100% disability is controverted by the evidence and seeks to circumvent strong evidence presented by appellee decided on by the Board in making its finding of fact and order and judgment. The Board's decision speaks for itself and simply shows that the Board found the alleged injury of January 30, 1973, was not a new injury and that plaintiff had the same disability before the incident that she had after the incident. This finding of fact is conclusive and supported by sufficient evidence and should not be disturbed as per rulings by the Court of Appeals based upon similar facts and circumstances. In *Young v. Burgett Ky.* 483 S.W. 2d 450, (1972), the Court stated:

“We have held many times that the claimant must carry the burden of persuasion in these proceedings and where the Board has found against the party having the burden, the test is whether the evidence for the claimant was so persuasive as to require finding in his favor. Where medical testimony is concerned, and that testimony is conflicting, the question of who to believe is one exclusively for the Board.”

In *Porter v. Goad*, 404 S.W. 2d 705 (1966), the Court held that in cases where the Board finds

against the person having the burden of proof the proper test is whether the finding is supported by evidence, substantial or otherwise. In rendering its opinion the Court stated :

“The reviewing Court would not set aside the finding of the Board unless the evidence in support of the claim was so clear-cut and convincing that the Court justifiably could conclude that the Board acted “erroneously” in finding against the claim.”

In *Hall v. Island Creek Coal Company*, 474 S.W. 2d 890 (1972), the Court again unequivocally pointed out this position as to whether or not to disturb the findings of the Workmen's Compensation Board and stated that:

“If there is conflicting evidence as to facts, the Board's findings will not be disturbed.”

It is obvious from reading the findings of the Workmen's Compensation Board in this particular case, and the applicable legal standard to be applied in disturbing or overturning a Board's decision, that appellant's appeal is not well taken and the judgment of the Floyd Circuit Court dismissing same should be affirmed.

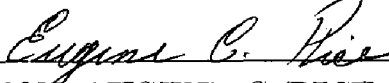
Appellants contention that presentation of her doctor's testimony is sufficient to negate evidence presented by appellee and therefore do away with a dispute as to the amount of her disability and its cause is frivolous at best and not within the purpose and scope of KRS 342.120. Based upon the facts presented to the Board their finding fully conformed

to the requirements of Kentucky law and more particularly Kentucky KRS 342.120.

CONCLUSION

Appellant stated in her argument allegations which are not supported by evidence presented to the Board as to her disability. Further, in view of the evidence presented, which is substantial in nature that appellant did not suffer a disabling injury while being employed by appellee in 1973 and if in fact she did receive an injury, that injury did not result in additional disability. Appellee therefore respectfully submits that the findings of fact, order and judgment of the Workmen's Compensation Board in the above captioned cause should be upheld and appellant's claim dismissed.

RESPECTFULLY SUBMITTED,


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